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No. 80-298

In the Supreme Court of the United States

October Term, 1980

ROGER D. MONROE,
Petitioner,

vs.

THE STANDARD OIL COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM IN RESPONSE FOR RESPONDENT THE STANDARD OIL COMPANY

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This memorandum is submitted on behalf of respondent The Standard Oil Company (hereinafter "Sohio") in response to the petition for a writ of certiorari filed by the Solicitor General on behalf of Roger D. Monroe.[1] Sohio does not oppose the petition. Rather, Sohio urges this Court to affirm the decision of the Sixth Circuit.

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1. Petition for a Writ of Certiorari, filed August 26, 1980, by the Solicitor General on behalf of Roger D. Monroe (hereinafter "Pet.", and its various appendices "App.").

QUESTION PRESENTED

The Sixth Circuit's decision is much more precise than the government's statement of the question would suggest. The court found that petitioner was not denied any employment benefit existing under the collective bargaining agreement and employment practices at his place of employment. Accordingly, nc discrimination prohibited by 38 U.S.C. §2021(b)(3) existed.

The question presented by the petition is more accurately stated as follows:

> Whether the reemployment rights provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §2021 *et seq.*, require an employer to provide a reservist preferential treatment, not available to other employees, in establishing work schedules whenever a conflict exists with any obligation arising by reason of reservist status.

STATUTORY PROVISIONS INVOLVED

While the government's request for this Court's review is based solely upon 38 U.S.C. §2021(b)(3), this provision must be interpreted in conjunction with 38 U.S.C. §2024(d), which provides in pertinent part:

> Any employee . . . who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training,

such employee shall be permitted to return to such employee's position with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

COUNTERSTATEMENT OF THE CASE

The government's statement of the case contains certain misstatements and omissions which need to be clarified for proper consideration of the issues presented by the petition.

1. There has been no claim that Roger D. Monroe was subject to discriminatory treatment in any manner by reason of his reservist status. Monroe has never contended that he suffered any harm in assignments, promotions, rate of pay, or administration of employee benefits by reason of such status. The record established that he was treated the same as other employees in establishing work schedules, and that, like other employees within his bargaining unit, he was freely permitted to exchange scheduled shifts with other employees (App. A 11a; App. D 19a). Monroe's claim stems solely from lost wages arising from his occasional inability to work his regular schedule due to conflicting reserve obliga-

tions; thus the district court described its monetary award as "wages lost as a result of serving his military obligation" (App. D 26a).

2. The government erroneously suggests that Sohio "made no effort to accommodate petitioner" (Pet. 9, n.6). On the contrary, the record shows that Sohio had negotiated provisions in the relevant collective bargaining agreement which permitted Monroe to exchange shifts whenever a conflict existed, and that he availed himself of this option on several occasions[2] (App. A 3a, App. D 19a). The government also states, erroneously, that "it is not disputed" that Monroe's schedule could have been rearranged by the employer whenever he had conflicting reserve obligations. In fact, the difficulties of continually juggling work schedules in a twenty-four hour per day seven day per week continuous process refinery operation for a workforce subject to a collective bargaining agreement were a major point of contention in the lower courts. *See* App. D 18a, 25a.

3. The government states that this case involves periodic attendance at training sessions (Pet. 2). But this case is not limited to the typical one weekend per month training obligation. The statutory provision upon which the government relies, 38 U.S.C. §2021(b)(3), extends to "any obligation as a member of a Reserve component of the Armed Forces". This statute is not limited by frequency or duration of occurrence or by nature of the obligation. What the government in fact seeks through this petition is a ruling applicable to any schedule conflict, no matter how frequently or unpredictably the conflicts occur and no matter whether the cause is

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2. It is unclear from the record whether the "four occasions" noted by the lower courts mean four days or four periods of one or more days.

training or a non-training obligation.[3] Such a ruling, if favorable to the government, would impose a new and significant burden upon employers.

4. The government erroneously suggests that the Sixth Circuit's decision holds a minimum work schedule of 40 hours per week to be a right guaranteed to reservists by 38 U.S.C. §2021(b)(3) (Pet. 4, 9). The court did not so hold; rather, the court properly concluded that this statutory provision is "purely derivative", and that

> . . . we read section 2021(b)(3) to protect only those employment benefits that a reservist can establish exist at his place of employment. In establishing their existence, incidents or advantages of employment must be ascertained by reference to employment rules or employer practices at the employer's business establishment. App. A 9a.

5. The government overlooks that it originally alleged Sohio had violated 38 U.S.C. §2024(d) as well as 38 U.S.C. §2021(b)(3). *Compare* Pet. 3 *with* App. A 3a. It has apparently abandoned this argument in view of the Sixth Circuit's recognition that the former section provides no basis for claiming the pay or the preferential scheduling sought on behalf of the petitioner. *See* App. A 8a. This provision nevertheless remains significant for this Court's consideration of the proper interpretation of 38 U.S.C. §2021(b)(3). 38 U.S.C. §2024(d) became part of the protective scheme for reservists in 1950; it specifically addresses an employer's obligations

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3. For example, the absences for which the government seeks compensation in this proceeding include three consecutive weekends in January, 1976. These were obviously not "periodic", and the government never sought to establish below that these were training sessions, rather than some other unanticipated obligation.

with regard to work schedules, employment practices and employee benefits in light of an employee's military training obligations. The subsequently enacted (in 1968) 38 U.S.C. §2021(b)(3) cannot be interpreted, as the government apparently would prefer, as if this pre-existing provision of the same statute no longer existed.

REASONS FOR AFFIRMING THE DECISION BELOW

I. THE SIXTH CIRCUIT'S DECISION CORRECTLY RECOGNIZES THAT 38 U.S.C. §2021(b)(3) IS DIRECTED SOLELY TOWARDS DISCRIMINATORY PRACTICES AND IS NOT AN AFFIRMATIVE ACTION MEASURE.

The government's argument, and the initial decision by the district court, are premised upon the interpretation of 38 U.S.C. §2021(b)(3) to require affirmative action by employers to compensate reservists for the inconveniences accompanying reserve obligations. In the district court's words:

> It requires positive action on the part of the employer, and gives to the employee with service obligations a right not given to employees with religious, health, or family obligations, which while they may be of equal concern to the employee, have no relation to the necessity of the Government to defend itself against enemy aggression. The very existence of the nation depends upon its ability to have a military force trained and skilled in the complex technology of modern warfare. Those who accept the obligation of military service are entitled to more than neutral treatment, or to be

treated no differently than those who do not accept this obligation. App. D 24a, 25a.

The Sixth Circuit correctly rejected this argument in reversing the decision of the district court, and holding that "section 2021(b)(3) merely requires that reservists be be treated equally or neutrally with their fellow employees without military obligations" (App. A 11a).

The conclusion that 38 U.S.C. §2021(b)(3) protects against discrimination, but that it does not impose affirmative action requirements, is the only conclusion consistent with the statutory structure and legislative history. As this Court noted in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946), courts are required "to construe the separate provisions of the Act as part of an organic whole . . .". Prior to the enactment of 38 U.S.C. §2021(b)(3), the predecessor provisions of 38 U.S.C. §2024(d) provided specific protections for reservists whose training obligations conflicted with work schedules. There was no suggestion of the affirmative action now sought by the government. The legislative history of 38 U.S.C. §2021(b)(3) focused upon the general problem of employer discrimination against employees with reserve obligations in such matters as hiring, promotion and assignments. It was not intended to address specific schedule conflicts, since that issue had long since been resolved by 38 U.S.C. §2024(d).

Nor does the language of the statute, cast as it is in the double negative ("[a]ny person . . . shall not be denied . . ."), suggest any meaning other than a straightforward ban on discriminatory practices. In marked contrast is the express affirmative action requirement imposed upon employers in 1974 when Congress addressed the employment problems of Vietnam era and handicapped veterans. *See* 38 U.S.C. §2012.

The government's argument, and the conclusions of those lower courts which have followed it, ignores the statutory language, structure and legislative intent and focuses solely upon an isolated passage from a 1966 House Committee on Armed Services Report on proposed legislation which was not enacted in that Congress. *See* Pet. 7, 8. In fact, this passage was deleted from the committee reports which accompanied the bill as finally passed in 1968 in a subsequent Congress. *Contrast* H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966) *with* H.R. Rep. No. 1303, 90th Cong., 2d Sess. 3, 8 (1968), S. Rep. No. 1477, 90th Cong., 2d Sess. 3 (1968).

The government's argument also ignores the statement in the same 1966 House Report that "(i)t should be noted that the only substantive changes in existing law relate to . . . the *prohibition against employer discrimination against reservists* who participate in the Reserve or National Guard programs" (*supra*, at 4) (emphasis added).

II. THE SIXTH CIRCUIT'S DECISION FOLLOWS PRIOR RULINGS OF THIS COURT THAT THE VETERANS' REEMPLOYMENT RIGHTS ACT DOES NOT REQUIRE COMPENSATION FOR WORKING TIME MISSED BY REASON OF MILITARY OBLIGATIONS.

This court has had occasion to review the provisions of veterans' reemployment rights legislation on several occasions, most recently just this past term in *Coffy v. Republic Steel Corp.*, No. 79-81 (June 10, 1980). One consistent principle emerging from this Court's decisions is that the protections of the Act do not extend to employment rights and benefits which are in reality compensation for the actual performance of work as opposed to a reward for length of service. *See Coffy v. Republic Steel, supra*; *Foster v. Dravo Corp.*, 420 U.S. 92 (1975).

Yet that is precisely how the government would have the Act extended in this case. The gravamen of its complaint is that Monroe did not work a 40-hour week, and was accordingly not paid for a 40-hour week, because of conflicts between his regular work schedule and reserve obligations. It is not clear whether the government is asking this Court to approve the district court's actual award of pay to Monroe for time not worked (*contrast* Pet. 9 n.6 *with* App. D 25a, 26a). Nevertheless, it is clear that whatever the remedy the government seeks, it is one intended to compensate for the loss of pay for time not worked. There is no basis for such a remedy under this Court's precedent.

III. RESERVISTS ARE ADEQUATELY PROTECTED BY THE MANDATORY LEAVE OF ABSENCE PROVISIONS OF 38 U.S.C. §2024(d) AND THE NON-DISCRIMINATION PROTECTION OF 38 U.S.C. §2021(b)(3), AS CORRECTLY INTERPRETED BY THE SIXTH CIRCUIT.

The Sixth Circuit's decision reaffirms and leaves intact the comprehensive protection for reservists that Congress has enacted over the years, now embodied in the Vietnam Era Veterans' Readjustment Assistance Act of 1974. It is hyperbole to suggest, as the government does, that protection for reservists is somehow "annulled" (Pet. 9).

The schedule conflicts inevitably associated with reserve obligations are fully protected by 38 U.S.C. §2024 (d). Employers are required to grant leaves of absence, to hold positions available, and to keep "seniority, status, pay and vacation" intact upon the reservist's return. This protection is supplemented by 38 U.S.C. §2021(b)(3), which, as properly read by the Sixth Circuit, protects reservists against discriminatory practices.

Prior to the decision of the district court in this case in February, 1978, there had never been any judicial suggestion that the statutory protection for reservists included the opportunity for reservists to make up or be paid for working time missed while engaged in reserve activities. The government does not, and cannot, argue that the absence of such judicial protection has hampered the functioning of the Armed Forces Reserves through their long history prior to 1978. Similarly, there is no reason to warn of a crisis once this Court lays this spurious notion to rest.

IV. THE SIXTH CIRCUIT'S INTERPRETATION OF THE STATUTE AND ITS INTENT IS CORRECT, AND THAT ADOPTED BY OTHER CIRCUITS IS IN ERROR.

The petition for certiorari is premised upon a conflict among the circuits. In fact, only two courts of appeals have addressed the issue of work scheduling raised by this petition, the Sixth Circuit in this matter and the Fifth Circuit in *West v. Safeway Stores, Inc.*, 609 F.2d 147 (1980).

While there are some critical factual distinctions between the two cases (for example, *West* involved a collective bargaining agreement with an express guarantee of a 40-hour week and it did not involve 24-hour, 7-day work schedules), the interpretations of 38 U.S.C. §2021 (b)(3) adopted by the two courts are in conflict. The government's petition for certiorari makes it clear that it intends to follow the *West* decision except in the Sixth Circuit. This will subject employers (including Sohio, whose subsidiaries have operations in several judicial cir-

cuits) to continuing litigation based upon the same arguments rejected by the Sixth Circuit in this case.[4]

The petition for certiorari presents this Court an opportunity to resolve this conflict at an early stage and to avoid subjecting employers to needless litigation. The interpretation of the statute adopted by the Sixth Circuit in this case is so obviously correct that this Court should grant certiorari for the purpose of affirming.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the Sixth Circuit affirmed.

Respectfully submitted,

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September 26, 1980

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4. The decisions in *Carney v. Cummins Engine Co.*, 602 F.2d 763 (7th Cir. 1979), *cert. denied*, No. 79-757 (Feb. 19, 1980) and *Carlson v. New Hampshire Dep't of Safety*, 609 F.2d 1024 (1st Cir. 1979), *cert. denied*, No. 79-1331 (Apr. 21, 1980) construe 38 U.S.C. §2021(b)(3) but do not involve the specific issue of work scheduling. While both decisions reach results that can be reconciled with the Sixth Circuit's reading of 38 U.S.C. §2021(b)(3) as an anti-discrimination measure, the rationale adopted by these courts of appeals cannot be squared with that of the Sixth Circuit.